

Nguyen (Migration) [2020] AATA 351 (14 February 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Thi Kim Mai Nguyen
CASE NUMBER:	1733051
HOME AFFAIRS REFERENCE(S):	BCC2015/2638172
MEMBER:	David Crawshay
DATE OF ORAL DECISION:	14 February 2020
DATE OF WRITTEN STATEMENT:	19 February 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 19 February 2020 at 11:54am

1. **CATCHWORDS**

2. *MIGRATION – cancellation – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – genuine spousal relationship – nominated as beneficiaries – photographs and statutory declaration provided – attended events as couple – genuine and continuing relationship – commitment to shared life – decision under review remitted*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2 cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant is Ms Thi Kim Mai Nguyen, 26, who is a citizen of Vietnam.
7. The applicant applied for the visa on 9 September 2015 on the basis of her relationship with her sponsor, Mr William La, 26. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
8. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the applicant did not meet the definition of spouse under s.5F of the Act. Specifically, the delegate found that there was insufficient evidence to demonstrate that the applicant was the spouse of the sponsor.
9. The applicant appeared before the Tribunal on 14 February 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, as well as from the sponsor's brother, Mr Bond Tran, Mr Tran's fiancée, Ms Amy O'Hara and the sponsor's mother, Ms Di La.
10. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
11. The applicant was represented in relation to the review by her registered migration agent.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

13. The parties claim to have first met over the telephone in or around April 2015. The applicant's sister was married to a man who was friends with the sponsor. The sponsor expressed his loneliness and his desire to meet people. The parties claim they were put in touch with each other. At this stage, the applicant was in Vietnam and the sponsor in Australia.
14. Over the next few months, the parties claim to have communicated with each other via Viber, Facebook Messenger and their mobile phones. The parties claim to have made a connection, and they claim to have spoken to each other every day or nearly every day. At this stage, the parties claim they were both not working or studying.
15. In July 2015, the applicant travelled to Australia under a Higher Education Sector visa (TU-573). The parties claim to have met each other in person when the sponsor picked the applicant up from the airport. The parties claim that they regarded themselves as being more than just friends.
16. The parties claim that the sponsor drove the applicant to where she was staying – at a house in Blackburn North where her sister and her sister's husband lived with his parents

(the Blackburn North address). The applicant claims that the sponsor stayed there for a while before heading back to his house in Glen Waverley (the Glen Waverley address).

17. The parties claim that the sponsor would come to visit the applicant at the Blackburn North address very often, sometimes bringing food. At other times he would come around to hang out or help her study.
18. The parties claim that the sponsor proposed to the applicant in August 2015. In early-September 2015, the parties were married in a small ceremony in Abbotsford that was attended by the applicant's sister and brother-in-law and the parents of the brother-in-law. The parties claim that the sponsor invited his mother and step-father but they did not attend as his mother was traditional and did not approve of what she considered a "quick decision". The parties claim that the sponsor moved in with the applicant at the Blackburn North after the wedding.
19. On 10 September 2015, the visa application was lodged.
20. The parties claim that, in the weeks following their wedding, the sponsor and his older brother attempted to convince their mother to approve of the parties' relationship. The parties claim that, after having met the applicant, the sponsor's mother began to approve of her.
21. In October 2015, the parties claim to have moved in together at the Glen Waverley address.
22. The parties claim to have travelled together numerous times over the next few years – to locations within Victoria such as Lake Mountain, the Mornington Peninsula, Ballarat and the Great Ocean Road, to Sydney four times and to the Gold Coast, and to Vietnam in late-2019 to visit the applicant's brother in hospital.

CONSIDERATION OF CLAIMS AND EVIDENCE

23. The issue in the present case is whether the applicant is the spouse of the sponsor under s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

24. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
25. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

26. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a certificate for a marriage that took place on 6 September 2015, and the certificate states that the marriage was solemnised under the *Marriage Act 1961*. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

27. It is worth noting that the Tribunal has received a substantial amount of evidence from the parties that was not in front of the delegate at the time they made their decision. The Tribunal will be forwarding this evidence on to the Department for their reference.

The financial aspects of the relationship

28. The Tribunal has considered any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses in assessing the financial aspects of the relationship.
29. The parties claim to not have any joint ownership of real estate. They claim to be living at the Glen Waverley address along with the sponsor's mother and step-father. The Tribunal accepts this evidence.
30. The parties claim to have bought two cars – a Hilux which is used by the sponsor and which is in both names; and a RAV-4 which is in the applicant's name – through an arrangement with the sponsor's mother, whereby she buys the cars and the parties progressively pay her back through transfers made from their joint savings account. Documentary evidence was presented to substantiate these claims, along with evidence given by the sponsor's mother at hearing. The Tribunal accepts this as evidence of joint ownership of major assets, as well as evidence of a joint liability.
31. In relation to the extent of pooling of financial resources, the parties told the Tribunal that they have two joint bank accounts – one cheque and one savings – which they opened on 15 September 2015. The applicant said that the sponsor's income goes into the joint cheque account, which is then used for paying for household expenses such as utilities and mobile telephone charges. She said that her income was mainly retained for groceries and fuel which she opted to pay for mainly by cash. The parties submitted statements for both accounts which cover a period from its opening until recently. A perusal of these statements confirms that they appear to have been used for the purposes claimed – in the case of the savings account, the parties have progressively accrued a reasonably sizeable sum of money; in the case of the cheque account, there are numerous transactions of a household nature. The Tribunal accepts this as evidence of the pooling of resources as well as the sharing of day-to-day household expenses.
32. Turning lastly to any legal obligations owed by one party to the other, the applicant told the Tribunal that both parties have nominated each other as beneficiaries under their respective superannuation funds. The applicant told the Tribunal that such nominations were made in 2016 when both parties began working. A statement for FY2017/2018 was submitted in respect of the sponsor's superannuation fund showing the applicant as his non-binding nominee. Based on this, the Tribunal accepts that the sponsor has made such nomination.
33. The evidence of the financial aspects of the relationship, taken in totality, points to the parties integrating their finances to a substantial extent at the time of decision. The Tribunal

notes, however, that the evidence in respect of the financial aspects of the relationship at the time of application is very limited. The Tribunal therefore gives this evidence very little weight at the time of application, while according it significant weight at the time of decision.

The nature of the household

34. The Tribunal has considered any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework in assessing the nature of the household.
35. The parties told the Tribunal that they do not have any children.
36. In relation to the parties' living arrangements, the applicant submitted that the sponsor came to visit her at the Blackburn North address regularly. After the parties got married, they reportedly moved in with each other at the Blackburn North address for a few weeks, before moving to the Glen Waverley address. They claim to have been living there since, along with the sponsor's mother and (until recently), the sponsor's older brother.
37. The parties have submitted copious amounts of documentation that seek to attest to their claimed joint residence at the Glen Waverley address, including correspondence addressed to one or both parties at that address from VicRoads, the police, the ATO, Medicare and other state and Federal agencies and bodies, as well as from BUPA, the RACV, ANZ Bank, Optus, Vodafone and various retailers. This correspondence covers a period from March 2016 until recently. At hearing, the applicant was questioned on aspects of the Glen Waverley address, and her answers were consistent with information gathered from open sources. Lastly, the sponsor's mother testified in support of the parties living at the Glen Waverley address. The Tribunal accepts this evidence and finds that the parties lived together as claimed during the period since their wedding in September 2015. It gives this aspect significant weight when considering the nature of the household.
38. In relation to the sharing of housework, the applicant told the Tribunal that she does the laundry and the vacuuming most of the time, while the sponsor cooks on his days off. The Tribunal accepts this evidence and gives it some weight.

The social aspects of the relationship

39. The Tribunal has considered whether the parties represent themselves to other people as being in a married relationship with each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities in assessing the social aspects of the relationship.
40. The parties have submitted numerous photographs of themselves in the company of friends and family, and these photographs date back to early on in their claimed relationship. The parties are seen with members of each other's families, including members of the applicant's family from Vietnam such as her mother and her brother, and members of the sponsor's extended family who live in Sydney, and the parties appear to have been embraced by these people. In a statutory declarations given in December 2018, a cousin of the sponsor, Ms Sylvia Tran stated as follows:

As husband and wife William and Mai have attended all family functions and informal gatherings together. I have often visited my aunt's house where I will observe Mai and William sharing household chores after work, cooking together for the extended family, and walking the family dog together.
41. Another of his cousins, Ms Dianne Tran, stated as follows in a letter of December 2018:

In 2015, William began talking about Mai as his girlfriend. Later that year, I first met Mai when William brought her along to a family event. Mai was understandably shy at first as we have a large family, which can be intimidating for some. However, we tried our best to make her comfortable and after a short while, Mai began to open up to our family. Since then, she has been considered part of the family.

...

It is rare to see William without Mai and vice versa. Mai is very much a part of our family now and has developed loving relationships with many of our family members. I have personally witnessed William and Mai celebrate significant events together, go on holidays together, be affectionate towards one another, and generally behave the way any other couple would.

42. The Tribunal accepts this evidence and accepts that the parties have represented themselves to other people as being in a relationship at the time of application and continue to do so. This evidence is given significant weight.
43. The Tribunal had the benefit of hearing from the sponsor's step-brother, Mr Tran, and from the fiancée of his step-brother, Ms O'Hara. Mr Tran told the Tribunal that his brother is a very affectionate person, and that the applicant also shows her affection. He said that the applicant has been great with his family. Ms O'Hara told the Tribunal that she believed the parties' love is genuine. She said that the parties have complementary personalities – the sponsor is fun and outgoing, whereas the applicant is more reserved, considerate and respectful. She said that the applicant is always involved in family activities.
44. The Tribunal has also had regard to other declarations and statements in support of the relationship. These documents all attest to its genuineness based on the authors' first-hand observations of the parties.
45. The Tribunal accepts this evidence of the opinions of friends and acquaintances about the nature of the parties' relationship and gives it substantial weight.
46. During the period of their claimed relationship, the parties claim to have embarked on a number of holidays together – to the Gold Coast with the sponsor's family and to Sydney a number of times to visit the sponsor's extended family, as well as to the Mornington Peninsula, the Great Ocean Road, Sovereign Hill and Lake Mountain. They hosted the applicant's mother during her visit in 2016, and they travelled to Vietnam in November 2019 to visit the applicant's family when her brother suffered a health scare. Evidence was submitted, primarily in the form of photographs, to substantiate these trips. The parties claim to have several mutual friends with whom they socialise, and both parties were able to name them without prompting. The parties told the Tribunal that they have attended weddings of friends as a couple, and that they attend events hosted by the sponsor's family. The Tribunal accepts that the parties plan and undertake a range of joint social activities. This evidence is given significant weight.

Nature of parties' commitment to each other

47. The Tribunal has considered the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term in assessing the nature of the parties' commitment to each other.
48. The claimed facts of the relationship, including its inception and development, are contained in the "Background" section above. It suffices in this instance to say that the parties claim to have met online in April 2015, to have met in person in July 2015, and to have married in

early-September 2015. The parties nominated that date as the date when they committed to a shared life together to the exclusion of all others. The parties claim to have begun living together on that date as well.

49. The Tribunal has had the opportunity to question the parties on the inception and development of their relationship. Based on the consistency of their testimony, as well as the corroborating testimony of others such as the sponsor's mother and step-brother, it is satisfied that the parties met as claimed and that their relationship developed as claimed. As above, the Tribunal is satisfied that the parties lived together as claimed as well. As at the date of application, the parties had been in a committed relationship for less-than-a-week. They had been living together for this length of time as well. Given the very short duration of their relationship and the length of time they had lived together up to that point, the Tribunal gives this aspect very little weight in its overall consideration of the nature of the parties' commitment to each other.
50. The Tribunal turns to the degree of companionship and emotional support the parties draw from each other. The parties spoke about each other at hearing in a genuine and spontaneous way, demonstrating an intimate and detailed knowledge of each other's lives when questioned by the Tribunal, including on the topics of family, study, employment and their daily routines. Both spoke candidly about the effect they have had on each other since meeting. The applicant said that the sponsor is sweet and cares for her. She spoke about how the sponsor offered her support when she was feeling homesick and stressed about her course during the early stages of her life in Australia. She said that the sponsor shares her sadness and happiness. The sponsor said that the applicant had helped him to kick a bad habit during a dark time in his life when he was on the "wrong side of the law". He said that, when he was recently in hospital suffering from a fever and bad cramps caused by tonsillitis, she was there by his bed offering him care. The sponsor also told the Tribunal that the applicant helped him to overcome his nerves during a period when he was feeling anxious about his job as a labourer. The Tribunal accepts this evidence.
51. The Tribunal has had particular regard to the preponderance of photographs of the parties together. These photographs show the parties in each other's company, and looking relaxed and at ease with each other. They are not afraid to show their affections in the presence of others.
52. This evidence in front of the Tribunal demonstrates to it that the parties draw a significant degree of companionship and emotional support from each other and from their relationship. The Tribunal gives the most weight to this evidence when considering whether the parties have a commitment to a shared life as a married couple to the exclusion of all others.
53. Turning lastly to the question of whether the parties view their relationship as long-term, the applicant told the Tribunal that the parties plan to buy a house and then to start a family. She said that the sponsor was hoping to transition to working full-time from casual so that he is able to secure a home loan. The applicant said that she would like to undertake study in either childcare or nursing. The sponsor spoke in similar terms and the Tribunal accepts this evidence.
54. When asked what she would do if her visa were not granted, the applicant said that she would continue to appeal. She said that she would be very sad as she wants to stay with her husband. The sponsor said that he would do whatever it took to have the applicant here with him. He said that he would travel to Vietnam if necessary, although he acknowledges the financial stress such a move would cause.
55. The Tribunal accepts that the parties have made provision for their future plans, and that they view their relationship as long-term. This evidence is given substantial weight.

CONCLUSION

56. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. The parties' relationship was genuine and continuing, they had a commitment to a shared life together, and they lived together at the time of application. Therefore the applicant meets cl.820.211(2)(a).
57. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application as per cl.820.211(2)(c)(i). The Tribunal is also satisfied that the applicant was the holder of a substantive visa at the time of application and is therefore not subject to the requirements of cl.820.211(2)(d).
58. Therefore, the applicant meets cl.820.211(2).
59. Because the applicant has continued to meet the requirements of cl.820.211(2) at the time of decision, she meets cl.820.221.
60. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

61. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).